No. 10,360

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MILWAUKEE MECHANICS' INSURANCE COMPANY (a corporation), *Appellant,* vs. SILVO QUESTA and JENNIE QUESTA (husband and wife), *Appellees.*	

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an action at law brought by appellees in the District Court of the United States for the District of Nevada, to recover $7500 under an alleged oral contract of fire insurance between appellees (citizens of Nevada) as assureds, and appellant (a Wisconsin corporation) as insurer. The appeal is from final judgment rendered in favor of appellees for $4000, after trial.

Jurisdiction of the District Court rests upon 28 *U. S. Code,* Sec. 41; and of this Court upon 28 *U. S. Code,* Sec. 225.

STATEMENT OF THE CASE.

a. The Pleadings.

The complaint alleges that on August 1, 1941, appellee Silvo Questa[1] applied to one Hassett, appellant's agent for fire insurance in the sum of $7500 upon a barn belonging to appellees; and that appellant agreed to insure the barn from August 1, 1941, for three years, under the usual form of policy to be delivered within a reasonable time.[2] These allegations (except as to Hassett's agency for appellant) are denied by the answer.[3]

It is alleged that the barn burned on September 20, 1941, whereby appellees sustained a loss of $7500.[4] These allegations also are denied.[5]

The remaining allegations and denials are not of importance on this appeal.

b. The Evidence.

Briefly,[6] Questa testified that on August 1, 1941, he met Hassett on the street in Reno and asked him to insure the barn for three years for $7500, and Hassett verbally accepted the insurance; no one else was present at this conversation.[7] He also testified to two subsequent conversations with Hassett before the fire con-

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[1] Appellees are husband and wife. For convenience, we shall refer to appellee Silvo Questa simply as "Questa".

[2] Complaint, IV; R 3.

[3] Answer, I; R 6.

[4] Complaint, V; R 3.

[5] Answer, II; R 6.

[6] The evidence is more fully considered hereinafter under the appropriate Specifications of Error.

[7] R 31-2.

cerning the insurance, one about the middle of August and the other about the last of August or early September;[8] but he was very definite that no amount of insurance was mentioned at either of these last two meetings.[9]

Hassett testified that Questa first mentioned insurance on the barn about June 25, 1941, at which time Questa asked him to come out to the ranch for the purpose of insuring the barn. Hassett said he could not come out immediately and asked if Questa wanted him to hold the barn covered by insurance pending his visit to the ranch. Questa said No, that he preferred to wait until Hassett came to the ranch; no amount of insurance was mentioned by either Questa or Hassett.[10] Hassett testified to subsequent conversations with Questa, but stated positively that at no time prior to the fire was there ever any discussion between them as to the amount of insurance that was to be placed on the barn.[11]

Mrs. Questa testified that Hassett visited the ranch in the latter part of August,[12] but Questa was not at home and she and Hassett did not discuss insurance.[13]

Witnesses Parish and Corica, called by appellant, testified that on September 9th (eleven days before the fire) Questa told them that he did not have the

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[8] R 34.
[9] R 77.
[10] R 153-5.
[11] R 160.
[12] R 96.
[13] R 104-5.

barn insured.[14] And Parish testified to a similar conversation with Questa between September 9th and the date of the fire.[15] Appellant also called witness Porta to prove an admission by Questa, after the fire, that he knew he was not insured when the barn burned.[16]

Questa and appellees' witness Williams testified as to values and reproduction costs of the barn;[17] appellant called witness Hickok as an expert on the extent of depreciation involved.

c. The Findings and Judgment.

The District Court, sitting without a jury, found that, on August 1, 1941, appellees applied to appellant for fire insurance on the barn *in the amount of $4000,* and that appellant agreed to insure appellees *in that amount* for three years from that date.[18] From this finding, the trial court concluded that an oral contract of fire insurance existed upon the barn *in the amount of $4000.*[19] The trial court also found that the barn was totally destroyed by fire, whereby appellees sustained loss to the amount of $4000.[20] Judgment was rendered for appellees for $4000.[21]

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[14]R 190-2; 207-8. Questa and Mrs. Questa, in rebuttal, testified that this conversation took place in July.

[15]R 210-11.

[16]R 176-7.

[17]Appellant's motion to strike this testimony is considered hereinafter; see Specifications of Error VI and VII.

[18]Findings, IV; R 18-19.

[19]Findings (Conclusions of Law), R 20.

[20]Findings, V; R 19.

[21]Judgment, R 21-2.

SPECIFICATION OF ERRORS.

I. There is a fatal variance between the contract pleaded as the basis of recovery and the contract found as the basis of the judgment. The complaint is based upon an alleged oral contract of fire insurance in the amount of $7500,[22] and it is this contract upon which recovery is sought. Contrary to the allegations of the complaint, the trial court found, and based its judgment upon, an oral contract in the amount of $4000.[23] (See Argument, I.)

II. The judgment is not supported by the findings of fact and conclusions of law made by the trial court. *First,* the findings and conclusions are conflicting, ambiguous, and uncertain as to the amount of insurance called for by the purported oral contract of insurance, and do not disclose the terms of the contract on which the trial court based its judgment. (See Argument, II, 1.) *Second,* the findings and conclusions are conflicting, ambiguous, and uncertain as to the amount of loss by fire, in that there is no finding of the value of the barn allegedly insured and destroyed. (See Argument, II, 2.)

III. The evidence is not sufficient to support the finding relating to the existence and terms of the oral contract of insurance,[24] and such finding is clearly erroneous. (See Argument, III.)

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[22] Complaint, IV; R 3.
[23] Findings, IV; R 18-19.
[24] Findings, IV; R 18-19.

IV. The evidence is not sufficient to support the finding relating to the amount of loss allegedly sustained by appellees as the result of fire,[25] and such finding is clearly erroneous. (See Argument, IV.)

V. The evidence is not sufficient to support the judgment in the rspects referred to in Specifications III and IV, supra. (See Argument, III and IV.)

VI. The trial court erred in denying appellant's motion to strike the testimony of appellee Questa that the value of the barn was $15,000;[26] the motion to strike was made upon the ground that Questa testified that this figure was replacement cost and not value, and that Questa was not qualified to testify as to replacement cost.[27] (See Argument, IV, 1.)

VII. The trial court erred in denying appellant's motion to strike the testimony of witness Williams relating to the replacement cost of the barn;[28] the motion to strike was made upon the ground that no proper foundation was laid for this testimony, that Williams did not have sufficient knowledge of the facts to justify the admission of his opinion testimony, and that his testimony was based on facts contrary to the admitted physical facts of the case.[29] (See Argument, IV, 2.)

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[25]Findings, V; R 19.

[26]R 40, 87, 94.

[27]R 40, 87, 94-5.

[28]The motion was directed to all of the testimony of Williams (R 105-133, 172-5), and to Exhibits "B" and "E" prepared by him. Exhibit "E" (replacement estimate) is found in the transcript of record at pages 114-15. Exhibit "B" (blueprints) was admitted (R 113, last line), although by typographical error the transcript refers to it as Exhibit "E"; it has been transmitted in original.

[29]R 130-2.

SUMMARY OF ARGUMENT.

Appellant's argument will be presented under the following points:

I. There is a fatal variance between the contract pleaded as the basis of recovery and the contract found as the basis of the judgment.

II. The judgment is not supported by the findings of fact and conclusions of law made by the trial court.

1. The findings and conclusions relating to the terms of the contract of insurance sued upon are conflicting, ambiguous, and uncertain.

2. The findings and conclusions relating to the amount of loss by fire are conflicting, ambiguous, and uncertain.

III. The findings of fact relating to the existence and terms of the oral contract of insurance are clearly erroneous.

IV. There is no competent testimony in the record supporting the finding relating to the amount of loss by fire. Appellant's motions to strike the testimony on values should have been granted.

ARGUMENT.

I.

THERE IS A FATAL VARIANCE BETWEEN THE CONTRACT PLEADED AS THE BASIS OF RECOVERY AND THE CONTRACT FOUND AS THE BASIS OF THE JUDGMENT.

The contract alleged in the complaint is an oral contract of fire insurance in the amount of $7500.[30] The trial court found an oral contract of fire insurance in the amount of $4000.[31] No amendment of the complaint was made or sought.

17 *CJS* (Contracts, Sec. 570) 1205:

> "It is almost elementary that . . . plaintiff who declares on a special or express contract and proves a contract essentially variant from the one declared on, cannot recover . . . ; . . . . the contract relied on must be established as pleaded . . ."

It is hardly necessary to argue that the amount of insurance called for by an insurance contract is of the very essence of the contract. And where the variance is as to a material part or term of the contract, it is as fatal to plaintiff's case as a misstatement of the whole contract.

17 *CJS* (Contracts, Sec. 571) 1207-8.

Ordinarily, of course, an objection as to variance must be taken at the trial. But here there was absolutely no evidence offered at the trial tending to prove that a contract of insurance existed between the parties to this action for any amount other than $7500. Questa testified that this was the amount agreed upon;

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[30] Complaint, IV; R 3.
[31] Findings, IV; R 18-19.

and Hassett, the only other person present when the contract was allegedly made, testified that there was no agreement to insure and that no amount whatever was either mentioned or agreed upon.[32]

There was, therefore, no occasion during the course of the trial when appellant could have objected to a variance between pleading and proof. Under these circumstances, appellant may raise the issue of variance for the first time on appeal.

> 3 *CJ* (Appeal and Error, Sec. 720) 796-7:
>
> "But the rule [that variance cannot be raised for the first time on appeal] does not apply where the objection could not have been obviated in the court below, or the evidence is such a departure from the allegations as to leave them unproved in their entire scope and meaning, or the judgment is based upon facts found or proved but not averred."

To the same effect: 4 *CJS* (Appeal and Error, Sec. 282) 552.

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[32]The only mention of the figure of $4000 is in the testimony of appellant's witness Porta, who testified that after the fire she overheard Questa say to Hassett (R 177): ". . . I told you three times to come out [to the ranch] and if you had come out there I would have [had] $4000 insurance on the barn . . ."

This, however, is evidence that there was no insurance in force at the fire and that Questa knew it. It is certainly not evidence that there was an oral contract of insurance in the amount of $4000, or any other amount. As was said in 3 *CJ* (Appeal and Error, Sec. 720, n. 86, par. i) 799:

> "But where plaintiff seeks to recover upon a special contract he cannot depart therefrom in his evidence on the trial, and base his right of recovery upon the evidence of defendant, showing a different contract, and offered by him to contradict the evidence of plaintiff, and to disprove the alleged contract sued on. The rule which will support a finding upon an issue tried by consent outside of the allegations of the pleadings does not apply to such a case."

II.

THE JUDGMENT IS NOT SUPPORTED BY THE FINDINGS OF FACT AND CONCLUSIONS OF LAW MADE BY THE TRIAL COURT.

Findings and conclusions are required by Rule 52, *FRCP*. They are intended to afford an understanding of the basis of the trial court's decision. They should be unambiguous, direct, and unequivocal.

> *Montgomery's Manual of Federal Appellate Jurisdiction and Procedure* (4th Ed.) 411;
> 3 *Moore's Federal Practice* 3119;
> *Nordbye, Improvements in Statement of Findings of Fact and Conclusions of Law,* 1 FRD 25, et seq.;
> 64 *CJ* (Trial, Sec. 1093) 1247-8:
>
> "The essentials of findings of fact are that they should be clear, concise, intelligible, definite, certain, unequivocal, direct, positive and conclusive, and not be vague or evasive."

There were two basic issues presented to the trial court. The first of these was: What were the terms of the oral contract of insurance, if any, on the barn? The second: To what monetary extent was the barn damaged by fire? We submit that it is impossible to read the trial court's findings, conclusions, and judgment (to say nothing of the "Memorandum Decision"[33]) and ascertain a reasonably definite answer to either of these questions.

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[33] R 16-17.

1. The Contract.

Paragraph IV of the findings,[34] standing alone, is clear enough to the effect that appellees applied for $4000 fire insurance on the barn, and that appellant agreed to insure it for that amount. But in the conclusions of law immediately following[35] it is stated:

> "That an oral contract of fire insurance upon plaintiffs' barn existed . . . and that the amount of insurance . . . covered by such oral contract *was a sum not less than $4000 which amount the court concludes to be the amount so covered by such oral contract . . .*"[36]

Similarly, the judgment[37] reads:

> "That an oral contract of fire insurance existed upon plaintiffs' barn . . . and that the amount of insurance . . . covered by such oral contract *was a sum not less than $4000 . . .*"[38]

The judgment for appellees cannot stand in the absence of a finding as to the terms of a contract between the parties. It is submitted that the proceedings shown by the record as having occurred after conclusion of the introduction of evidence and argument do not disclose in any satisfactory way what the

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[34] R 18-19.
[35] R 20.
[36] Italics in quotations are ours throughout.
[37] R 21-2.
[38] And, see the memorandum decision (R 16):

> ". . . It is the conclusion of the Court that the evidence is sufficient to establish an oral contract of fire insurance upon Plaintiffs' barn which later was destroyed by fire and that the amount of insurance at that time, covered by such oral contract, was a sum not less than $4000, which amount the Court finds to be the amount so covered by such oral contract . . ."

contract was on which the trial court based its judgment.

It is well settled that the labeling of a finding of fact as a conclusion of law is of no significance, and that a judgment must stand if, taken as a whole, the findings of fact and conclusions of law, though mingled, support it.

> *O'Reilly v. Campbell,* 116 US 418, 29 LEd 669, 670;
>
> *Compania Trans. De Petroleo v. Mexican Gulf Oil Co.* (CCA 2) 292 F 846, 848.

It should follow that, unless the findings, conclusions, and judgment taken as a whole reasonably disclose the factual determinations necessary to support the judgment, the latter cannot stand.

2. The Amount of Loss by Fire.

Paragraph V of the findings reads:[39]

> "That . . . on about September 20, 1941, the said barn was totally destroyed by fire, whereby the plaintiffs sustained loss to the amount of $4000."

In the conclusions of law[40] it is stated:

> ". . . That the damage sustained by Plaintiff, by reason of said fire, was not less than such amount [$4000]."

The judgment[41] contains a recital in the same words as those last quoted, as does also the memorandum decision.[42]

[39] R 19.
[40] R 20.
[41] R 22.
[42] R 16.

The statement that appellees sustained loss or damage to the extent of $4000 by reason of the fire is a conclusion of law.[43] The destruction of the barn may have caused loss or damage to appellees far in excess of the actual cash value of the barn, but this does not mean that appellant would have been liable under the (alleged) oral contract of fire insurance for more than such actual cash value. It is expressly provided in the standard fire policy prescribed by the laws of Nevada:[44]

> "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused . . ."

In the absence of a finding of fact of the value of the property destroyed at the time of its destruction, it is submitted that the judgment cannot stand.

III.

THE FINDINGS OF FACT RELATING TO THE EXISTENCE AND TERMS OF THE ORAL CONTRACT OF INSURANCE ARE CLEARLY ERRONEOUS.

1. The Findings.

The trial court found:[45]

> "That on the 1st day of August, A. D. 1941, Silvo Questa for plaintiffs applied to Frank Has-

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[43]Cf., *Hubshman v. Louis Keer Shoe Co.* (CCA 7) 129 F2 137, 142.

[44]Nevada Insurance Act (1941), Sec. 117. Such a policy was introduced in evidence by appellees as Exhibit "C" (R 42-3).

[45]Findings, IV; R 18-19.

sett, Esq., who was then and there the duly authorized agent of the defendant, for insurance in the sum of $4000 against loss or damage by fire upon a large barn . . . , the property of the said plaintiffs and the defendant, by their said agent, in consideration of the premises, which was to be the same rate as all other insurance held by plaintiffs with defendant to be paid defendant by plaintiffs, agreed to insure the plaintiffs on the said large barn . . . from the 1st day of August, A. D. 1941, for a space of three years and to execute and deliver to plaintiffs within a reasonable and convenient time their policy of insurance therefor in the usual form of policy issued by them insuring said plaintiffs' barn for the sum of $4000 against loss and damage by fire."

2. Nature of Proof Required to Establish an Oral Contract of Insurance.

It is well settled by an overwhelming line of authorities that proof of the making of an oral contract of insurance must be clear and convincing.

American Can Co. v. Agricultural Ins. Co., 12 CA 133, 106 P 720, 721:

"A parol contract of insurance may be made and is enforceable; but as such contracts are rarely made, and are not made in the usual and ordinary course of business, the proof of such oral contract must be clear and convincing . . . It is at once apparent, even to the layman, that in the somewhat unusual claim that an oral contract of insurance was entered into, the only safe and sound rule is to require the proof to be clear and convincing to the effect that the contract was actually entered into, that each party understood

it in the same light, and in regard to the same subject-matter."

To the same effect:

Law v. Northern Assurance Co., 165 C 394, 132 P 590, 593;

Toth v. Metropolitan Life Ins. Co., 123 CA 185, 11 P2 94, 95;

Couch, Cyclopedia of Insurance Law, Vol. 1, p. 142; Vol. 8, pp. 7153-4;

1 *Cooley's Briefs on Insurance* (2d Ed.) 501-2, 530;

Annotations: 92 *ALR* 232, 236-7; 69 *ALR* 559, 565-8; 15 *ALR* 995, 1004-8.

3. Summary of the Evidence.

a. To establish the making of the contract, appellees rely entirely upon the testimony of Questa. Even if this testimony stood alone in the record, it would hardly suffice to furnish a satisfactory foundation for a finding that an oral contract was entered into, because of the many internal inconsistencies and contradictions it contains.

On *direct examination* Questa testified to the following events.

Conversation I with Hassett took place on August 1, 1941, on Virginia Street. He asked Hassett to insure the barn for three years for $7500 in the usual form.[46] He also asked Hassett concerning insurance on a station wagon he had purchased from Brown

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[46] R 31-2.

Motors.[47] Hassett assured him "that he would insure the barn and that he would come down to the ranch to see the barn".[48] "We both spoke about it being with the same company under the same conditions set forth in those policies issued by" defendant. He testified that Exhibit "C" (a fire insurance policy on his house) was the customary form of policy received by him from Hassett, and similar to other policies received from Hassett.[49]

Conversation II was in the middle of August. "I again spoke to him about the insurance policy. All he said was that he would take care of it."[50] Conversation III was in late August or early September, and Questa "asked him about the policy". Hassett replied "I will take care of it; I will come down".[51]

The barn in question had been insured by Questa in the early 1920's, but he did not remember for what amount or in what company.[52]

On *cross examination* Questa admitted that Exhibit "C" was the only policy he ever received from Hassett in that form before the fire.[53] He fixed the date of conversation I as a few days after his purchase of a car on July 25th; he did not think the conversation took place before August 1st.[54] He stated that he was "very sure" about the dates of his conversations with

[47]R 32.
[48]R 32.
[49]R 42-3.
[50]R 34.
[51]R 34.
[52]R 59-61. See, also, R 89-90.
[53]R 48.
[54]R 58.

Hassett;[55] he admitted that he had talked to Hassett before he purchased the car, but not about insurance on the barn.[56] He then did an about-face and admitted that he could not remember if conversation I took place after the car purchase; he decided that he was not sure whether it was before or after.[57] He admitted making a prior statement under oath that conversation I took place in July, a few days before he bought the car.[58] He testified that the prior statement "must have been" incorrect.[59] He could not remember the date he spoke to Hassett regarding furniture insurance.[60]

He first denied that he asked Hassett to come down to the ranch and look at the barn;[61] but he then contradicted himself and said that he did ask Hassett to do so.[62] He made the pregnant admission: *"Well, as far as I know, they all take a look at buildings before they insure."*[63] He was asked whether, at conversation I, Hassett asked if Questa wanted the barn covered by insurance pending the time Hassett could visit the ranch; Questa's reply was "I don't remember that", but he did not deny it.[64]

He was "quite sure" that at conversation I he also told Hassett he wanted $4000 insurance on the stone

[55] R 61.
[56] R 62.
[57] R 62.
[58] R 65-6.
[59] R 67.
[60] R 74.
[61] R 69-70.
[62] R 70, 71.
[63] R 70.
[64] R 76.

house,[65] but he could not explain why he omitted to say this in his prior sworn statement.[66]

He was "quite sure" that he never mentioned to Hassett the reproduction cost of the barn before the fire;[67] but his counsel stipulated that in his prior sworn statement he testified to the exact contrary.[68]

He admitted that the amount of insurance to be written was never mentioned except at conversation I.[69]

He insisted that Hassett's visit to the ranch took place after Hassett's bookkeeper had been to the ranch and received a check;[70] the bookkeeper's visit he fixed on August 15th.[71] When confronted with his prior statement that Hassett visited the ranch before August 15th,[72] he first insisted that was wrong,[73] but finally admitted that he was not sure.[74]

He said that conversation II with Hassett took place on Virginia Street about the middle of August; and conversation III at the Riverside Bar in late August or early September.[75] He said that Hassett had already visited the ranch before conversation II, and that he did not expect Hassett to come to the ranch

[65]R 63-4.
[66]R 73-4.
[67]R 85.
[68]R 85-6.
[69]R 77.
[70]R 77-8.
[71]R 44.
[72]R 78.
[73]R 78-9.
[74]R 80.
[75]R 34.

again.[76] Subsequently, he doubted if Hassett had been to the ranch before conversation II;[77] he then asserted that he was "quite sure" that Hassett had been to the ranch before conversation II;[78] and he finally admitted that he did not remember whether conversation II took place before or after the ranch visit.[79]

He insisted that conversation III took place after Hassett's visit.[80] And, although he asserted that the purpose of Hassett's visit was to ascertain the amount of insurance that the company would write, he said that there was no talk whatever about the amount of insurance at conversation III.[81] Although he insisted that there was no point to a second visit to the ranch by Hassett,[82] he admitted that at conversation III Hassett said "I will take care of it; I will come down".[83]

We believe that plaintiffs' counsel summed up Questa's testimony in a masterpiece of understatement on redirect, when he said: "Mr. Questa, you were more or less confused on one or two questions there".[84]

b. Hassett fixed the date of his first conversation with Questa on barn insurance as the middle of June; and he fixed the date and place by a specific event

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[76]R 77.
[77]R 81.
[78]R 82.
[79]R 83.
[80]R 83.
[81]R 83-4.
[82]R 77.
[83]R 34, 84-5.
[84]R 86-7.

that occurred at the same time.[85] He testified that he asked Questa if he wanted the barn held covered by insurance "until I come out to the ranch", and that Questa replied "No, wait until you come out and see it"; that no amount of insurance was mentioned at all.[86] Two or three weeks later he saw Questa on Virginia Street, and Questa asked him when he was coming to the ranch; he said he would be out within the next day or two; nothing was said regarding values or amount of insurance or rates.[87]

Hassett went to the ranch around July 10th; he saw Mrs. Questa, who said she had nothing to do with insurance and said he would have to see her husband who was not then at home.[88] Hassett fixed the date of his visit to the ranch with reference to the automobile insurance, which came to him on July 25th.[89] Two days later he met Questa at Club 116, and the latter wanted to know when he was going "to come out to the ranch and insure the barn"; they discussed the automobile insurance; but there was no talk with regard to the amount of insurance wanted on the barn.[90] This was Hassett's last conversation with Questa prior to the fire, and he did not get out to the ranch again.[91]

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[85] R 153-5.
[86] R 155.
[87] R 155-6.
[88] R 156-7. Mrs. Questa also testified regarding Hassett's visit to the ranch; she agreed that Hassett did not go into the barn (R 97), and that they did not discuss insurance (R 104-5).
[89] R 156-8.
[90] R 158-9.
[91] R 160.

After the fire, Hassett blamed himself for not having brought the barn insurance matter to a head before the fire occurred, but he testified positively that no amount of insurance had ever been mentioned between him and Questa at any time prior to the fire.[92] Questa came to Hassett's office after the fire to inquire if he was insured; Hassett replied that he was not, but that in view of Hassett's failure to get out to the ranch as requested, he would submit the entire matter to appellant for decision.[93] Questa blamed Hassett, and said that if Hassett had come out to the ranch he (Questa) would have insured the barn for $4000.[94]

c. Hassett's testimony, unlike Questa's, is consistent throughout; and is, indeed, strengthened by his obvious desire to give Questa the benefit of every doubt. It is, moreover, corroborated to the point of invulnerability by the testimony of three other witnesses.

(1) Witness Corica, an insurance competitor of Hassett's,[95] testified that he and Witness Parish went to the Questa ranch on September 9th in connection with the insurance of some hay located in the barn in question and belonging to one Mrs. Cupit.[96] He fixed the date beyond argument by reference to his office copy (daily report) of the insurance policy which he issued the following day;[97] this daily report the wit-

[92] R 160-1.
[93] R 162.
[94] R 162-3.
[95] R 189-90.
[96] R 190-1.
[97] R 191.

ness had with him in Court and it bore the date of September 10th.[98] "Mr. Parish asked Mr. Questa if he had insurance on the barn. *Mr. Questa said that he did not have it insured.* He asked us what the rate would be. We gave him an approximate rate . . . Mr. Parish asked him if he wouldn't let him insure it. Mr. Questa said he didn't want to insure it, that Mr. Hassett took care of all his insurance business."[99]

(2) Witness Parish, who accompanied Corica, confirmed this conversation: "As we walked out of the barn, I asked him (Questa) if he had insurance on the barn and he replied *No* . . ."[100] Parish, too, was able to fix the date of this conversation with indubitable accuracy. Mrs. Cupit had placed the order for the hay insurance on August 15th.[101] On August 27th, Parish caused a cover note or binder to be issued through Corica's office evidencing this insurance; this cover note (Exhibit "5"[102]) is dated August 27th and evidences insurance coverage beginning August 15th. Parish held the cover note in his office until September 9th, on which date he asked Corica to visit the ranch with him to ascertain the amount and value of the hay and place of storage so the final policy could be issued. On the same day upon returning to his office from the ranch, Parish wrote on the cover note in longhand the notation "Ordered 9-9-41, Parish,

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[98] R 199-200.
[99] R 192.
[100] R 208.
[101] R 214.
[102] R 205-6.

Corica."[103] This notation enabled Parish to fix the exact date of his visit to the ranch.

Appellees took the stand in rebuttal and attempted to fix the date of the Corica-Parish visit in July instead of August. Mrs. Questa testified to July as the date when two men came to the ranch and she directed them to Questa. But both Corica[104] and Parish[105] said they did not see or talk to Mrs. Questa at all. And Parish's testimony that he had no request for insurance on the Cupit hay prior to August 15th,[106] corroborated as it is by the cover note (Exhibit "5"), should clinch the matter of date.

Moreover, Parish testified that he followed up his attempt to procure the insurance on Questa's barn when he met Questa in Reno between September 9th and the fire. Parish asked him if he had ever written the insurance on the barn, and Questa replied in the negative.[107] There was no refutation whatever of this testimony.

(3) Witness Porta, Hassett's secretary, testified to a portion of a conversation that she overheard between Questa and Hassett shortly after the fire. She heard Questa raise his voice in anger and say: ". . . I told you three times to come out *and if you had come out there I would have $4000 insurance on the barn* . . ."[108] This testimony cannot be reconciled with

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[103] R 202-3.
[104] R 191.
[105] R 239.
[106] R 240.
[107] R 210-11.
[108] R 177.

that of Questa any more than can the testimony of Corica or Parish.

d. Hassett,[109] Corica,[110] and Parish[111] testified without contradiction that it is the custom of the insurance business as conducted in Reno, where there is any long delay between the placing of a firm order for insurance in a specific amount and issuance of the completed policy, a cover note or binder is written up to evidence the existence of insurance in the interim. The very fact that that was not done here, although admittedly done by Hassett in all other cases involving Questa both before and after the barn insurance conversations,[112] is also strong corroboration of appellant's position.

We submit that the finding that there was an oral contract of insurance in existence at the time of the fire is clearly erroneous in the light of the evidence. And further, and entirely independently of this, the finding that there was an oral contract for insurance *in the amount of $4000* is indisputably erroneous and is not supported by any evidence whatever.

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[109] R 155-6.
[110] R 195.
[111] R 204.
[112] R 146-8; Exhibit "4", R 149-50; R 165-6.

IV.

THERE IS NO COMPETENT TESTIMONY IN THE RECORD SUPPORTING THE FINDING RELATING TO THE AMOUNT OF LOSS BY FIRE. APPELLANT'S MOTIONS TO STRIKE THE TESTIMONY ON VALUES SHOULD HAVE BEEN GRANTED.

The complaint alleges that the barn "was totally destroyed by fire, whereby the plaintiffs sustained loss to the amount of $7500."[113] These allegations are denied by the answer.[114] The trial court found that the barn "was totally destroyed by fire, whereby the plaintiffs sustained loss to the amount of $4000."[115]

Mrs. Questa's parents acquired the ranch about 40 years ago, and the barn was already there;[116] Questa was not sure, but he did not think it was as old as 50 years.[117] It had been built out of old mill timbers from Virginia City.[118] The roof had never been reshingled.[119] Questa had painted the barn about 8 years before the fire,[120] and had spent $400 or $500 to put in cement pillars and about $150 to fix some of the windows and doors.[121] The floor had been torn out, and there were no floor and no stalls in the barn when it burned; also, the boards had been pulled out of the hayloft floor "to get air to the onions".[122] Questa said the barn was "in excellent condition".[123]

113Complaint, V; R 3.
114Answer, II; R 6.
115Findings, V; R 19.
116R 102-3.
117R 53.
118R 38.
119R 57.
120R 57.
121R 55-6.
122R 56-7.
123R 38.

1. On direct examination of Questa, the following occurred:[124]

> "Q. Are you familiar with the value of the barn? A. Yes.
>
> Q. And what would you value the barn at?
>
> A. $15,000.
>
> Q. Do you mean it would cost that to replace it? A. Yes.
>
> Mr. Levit: I move the witness's answer be stricken because the replacement cost, your Honor, is not the value of the barn. The witness is not qualified to testify as to replacement cost. If your Honor feels he is qualified to testify as to value, we have no objection to that, but by his testimony now he has indicated the figure he gave us was in no sense a figure of value and he has not been qualified with regard to replacement costs and therefore I move his answer be stricken as to replacement value.
>
> The Court: I will reserve ruling on that. We will take that up later."

On redirect, Questa was again asked his opinion of the value of the barn "taking into consideration depreciation, etc." Again, he replied $15,000; and appellant renewed its objection and motion to strike.[125]

A few questions later, he said that the barn's value at the fire was $8000.[126] But on cross examination, the following occurred:[127]

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[124] R 40.
[125] R 87.
[126] R 88.
[127] R 93-5.

"Q. Now, Mr. Questa, how much do you think, in your opinion, a barn of the type of this barn depreciates per year?

A. Well, I haven't any idea, I couldn't say.

Q. Well, your figure of $8000, did you take depreciation into consideration in fixing that figure?

A. I believe it should have been insured for 50 per cent.

Q. 50 per cent of what?

A. Fifteen thousand.

Q. That was your testimony as to what the replacement cost was, is that right? A. Yes.

Q. In other words, you figured there was a depreciation of 50 per cent?

A. No, I didn't mean it that way.

Q. Will you explain what you did mean then in fixing that $8000 figure?[128]

A. Well, I figured $8000 would have been the right amount of insurance, $7500 to $8000, for the barn.

Q. Well now what did you consider the value of the barn to be at the time of the fire?

A. $15,000.

Q. In other words, the figure of $8000 that you gave was merely the amount of insurance that you think it would have been proper to carry?

A. Yes, $7500 to $8000.

Q. But your testimony as to the value of the barn at the time of the fire was $15,000?

A. I must have misunderstood the question.

Q. Well, how is it now?

A. Well, the barn was valued at $15,000.

Q. By you, is that right? A. Yes.

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[128]The word "figure" reads "premium" in the transcript, but this is obviously a mistake.

Q. That was your idea of its value as it stood on the day of the fire? A. That is right.

Q. And what was the figure of $8000 that you mentioned? A. For insurance, $7500 to $8000.

Q. In other words, that was all the insurance on it that you wanted to carry?

A. That is right.

Q. In other words, you were figuring on insuring it for about 50 per cent of what you considered its value to be? A. That is right.

Mr. Levit: I think that is all, your Honor, except I would like to renew my motion in regard to the testimony.

The Court: We will take those motions up at the time of the argument . . ."

Appellant renewed the motion to strike Questa's testimony as to value in its briefs and on the oral argument, but presumably it was denied as the record is silent on the point.

Questa's figure of $15,000 was stated by him to be his estimate of replacement cost. But Questa was not properly qualified to testify to replacement cost, and obviously replacement cost is not value because it omits the element of depreciation. Questa's figure of $8000 was stated by him to be, not value, but rather his idea of the amount of insurance he wanted to carry; it was, he said, merely an approximate halving of his value figure of $15,000—which was not value at all, but replacement cost, according to his own testimony.

It is submitted that the testimony of Questa furnishes no support whatever to the trial court's finding

of the value of the barn;[129] and that the court erred in not striking the testimony as moved by appellant.

2. The only other testimony in the record on value was that of appellees' witness Williams, who was called as an expert. Williams had been a building contractor for 32 years; he had built houses, churches, a telephone building, a furniture store, and a hotel.[130] But the last barn he remembered working on was in California in 1902, and he had not repaired any barns in the last 40 years.[131]

Williams was called to establish replacement cost of the barn. Yet it is clear that, even granting his qualifications as an expert, he did not have sufficient acquaintance with the barn or information concerning it to lay a proper foundation for his testimony. *Five years* before the trial he had done some work on *another* building on the ranch, about 300 feet from the barn. He went in the barn *once or twice* "to get something", but he did *not* go through it or inspect it.[132] He was asked on direct whether he recollected anything such as "extraordinary irons or braces or angles or lag screws" in the barn, and his answer was that he "didn't pay so much attention to that".[133] Before he drew his plans he "went down on the river bank" and "hunted up the old braces", because he "didn't know exactly what they were"; he found

[129] *If* there is such a finding, which appellant disputes. See, *supra,* Argument, Point II, 2.
[130] R 106.
[131] R 123-4.
[132] R 107.
[133] R 110.

"a part" of them.[134] He was able to measure the ground dimensions, but he asked Questa "how high it was".[135] The only information he got from Questa was as to the height; he just "figured out as near as I could remember" how the barn was built from his casual visit five years before. The floor was "one thing I wasn't sure about", but he included it in his replacement estimate.[136] He had never gone into the hayloft, and "didn't pay any particular attention, no more than I sized it up"; but his estimate called for a hayloft floor of the best type of construction that would be used in a structure of this kind.[137] He did not do "so very much" guessing in preparing his estimate, but "some things . . . I had to guess at".[138] He was "almost certain", but only from a five-year old memory, of the type of wall construction.[139] He "figured" there had been a brace over each post in making his estimate, although it would not have been possible for him to have seen this and he admitted that in fact he had not seen a brace over each column; but he found "some" of the old lumber and rods along the river bank.[140]

He was totally unaware that the barn that burned had had no floor, floor joists, or stalls in it, and when this was called to his attention he was forced to de-

[134] R 110.
[135] R 112.
[136] R 118-9.
[137] R 123.
[138] R 125.
[139] R 174.
[140] R 174-5.

duct $3625.99 from his replacement estimate of $14,-235.30,[141] thus admitting an error in his figures of more than 25 per cent. He admitted also that the concrete piers were still in place after the fire and had not been damaged, yet his figures included a completely new set of piers;[142] he explained that he preferred a different type of pier construction, although that would result in a better building than the one that burned.[143]

Appellant moved to strike the testimony of Williams and Exhibits "B" and "E" prepared by him on the ground that no proper foundation was laid for his testimony, that he himself had no foundation for arriving at his estimate, and that his estimate was based on facts not in accordance with the admitted physical facts involved. The court refused to rule at the time[144] and did not expressly do so later, although appellant renewed the motion in briefs and argument; the motion must be deemed to have been denied.

> *Atlantic Life Ins. Co. v. Vaughan* (CCA 6) 71 F2 394, 395-6:
>
> "While the courts will give wide latitude to the reception of expert opinion evidence, we think it axiomatic that it must be based upon conceded or proved facts, and that a naked opinion, based obviously on mere speculation and conjecture does not rise to the dignity of evidence, especially when it is in conflict with the conceded physical facts . . ."

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[141] R 173.
[142] R 116-7.
[143] R 117.
[144] R 131-2.

20 *AmJur* (Evidence, Secs. 787, 793) 661, 666:

"An opinion of an expert must be based upon facts, proved or assumed, sufficient to form a basis for an opinion, and cannot be invoked to supply the substantial facts necessary to support that conclusion."

"If the witness called upon to give expert testimony is acquainted with the facts of the case . . . he may give his opinion upon the basis of his knowledge and observation in response to direct interrogation, *provided he is shown to have sufficient knowledge of the facts to enable him to form an opinion entitled to be given weight by the jury . . .*"

32 *CJS* (Evidence, Secs. 545, 546) 284-5, 326-7;

Hammaker v. Schleigh (Md.) 147 A 790, 65 ALR 1285, 1296-7;

Irion v. Hyde (Mont.) 105 P2 666, 669-70;

Detroit Fire & M. Ins. Co. v. Gagliardi (Colo.) 32 P2 832, 835;

Security Ins. Co. v. McAlister (Okla.) 217 P. 430.

Appellant's motion to strike the testimony of Williams should have been granted; and, in any event, it cannot be said to furnish evidentiary support for any finding on the amount of loss by fire. The purported finding on this point is clearly erroneous and without any competent evidence to support it.

For the reasons and upon the grounds above stated the judgment appealed from should be reversed.

Dated, San Francisco, California,
April 14, 1943.

Respectfully submitted,
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